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In the Supreme Court of the United States

OCTOBER TERM, 1984

WEST MICHIGAN BROADCASTING COMPANY, PETITIONER

v.

FEDERAL COMMUNICATIONS COMMISSION, ET AL.

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT**

**BRIEF FOR THE FEDERAL COMMUNICATIONS
COMMISSION IN OPPOSITION**

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QUESTION PRESENTED

Whether the Federal Communications Commission properly awarded the license for a new radio station to another fully qualified applicant, rather than petitioner, based on various factors including the race of the successful applicant.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 35a-64a) is reported at 735 F.2d 601. The decision of the Federal Communications Commission (Pet. App. 1a-34a) is reported at 91 F.C.C. 2d 1260.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1984. A petition for rehearing and suggestion for rehearing en banc were denied on August 2, 1984 (Pet. App. 66a-68a). The petition for a writ of certiorari was filed on October 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner West Michigan Broadcasting Company (West Michigan) and Waters Broadcasting Corporation (Waters) filed mutually exclusive applications for authority

(1)

to construct and operate a new FM broadcast station in Hart, Michigan. Petitioner is owned by two men and one woman, all of whom are residents of Hart and proposed to participate full-time in the operation of their station. Waters is wholly owned by a black woman who lived about 30 miles from Hart but within the proposed service area of the station. She proposed to move to Hart and to participate full-time in the management of the station. Pet. App. 2a, 37a.

When the FCC compares mutually exclusive applications for new broadcast facilities, it looks at two principal factors: diversification of control of the media of mass communications and the best practicable service to the public. See *Policy Statement on Comparative Broadcast Hearings (1965 Policy Statement)*, 1 F.C.C.2d 393 (1965). See also *Cleveland Television Corp. v. FCC*, 732 F.2d 962, 972 (D.C. Cir. 1984). Neither applicant in this case owns any other media interests (Pet. App. 8a-9a); therefore, the comparative choice between them depended on which applicant would provide the best practicable service. Participation in station management by owners, which is commonly referred to as the "integration" of ownership and management, is a factor of "substantial importance" in determining which applicant is superior under the best practicable service objective. *1965 Policy Statement*, 1 F.C.C. 2d at 395.¹ This factor has a "quantitative" aspect, i.e., the degree to which the owner or owners will be involved in the station's management. It also has "qualitative" aspects. Among the attributes viewed by the Commission as qualitatively enhancing an integration proposal are

¹Other factors, such as proposed program service, past broadcast record, efficient use of the frequency and character, may also play a role in determining which applicant will provide the best practicable service. *1965 Policy Statement*, 1 F.C.C. 2d at 397-399. These factors were not involved in this case.

the local residence, civic participation, past broadcast experience, race, and gender² of the owner. See *TV 9, Inc. v. FCC*, 495 F.2d 929, 941 & n.2 (D.C. Cir. 1973), cert. denied, 419 U.S. 986 (1974); *WPIX, Inc.*, 68 F.C.C. 2d 381, 411-412 (1978); *1965 Policy Statement*, 1 F.C.C. 2d at 395-396.

2. The awarding of the license in this case turned on the precise weight to be given the various qualitative factors. The administrative law judge awarded the license to Waters, finding that Mrs. Waters' proposal to integrate ownership into management was superior to petitioner's and that she had a superior knowledge of Hart. The administrative law judge also gave her a preference on grounds of gender and race. *Waters Broadcasting Corp.*, 88 F.C.C. 2d 1213 (A.L.J. 1981).

The Review Board reversed. The Board concluded that Mrs. Waters was entitled to "only slight enhancement" based upon her residence and participation in the affairs of a community 30 miles from Hart. The Board then held that, other factors being equal, local residence should take precedence over minority ownership. *Waters Broadcasting Corp.*, 88 F.C.C. 2d 1204 (Rev. Bd. 1981).

A divided Commission reversed the Review Board (Pet. App. 1a-11a). The Commission awarded Waters "moderate" as opposed to "slight" enhancement for her residence and civic activities (*id.* at 4a-6a). With this modification, the balance tipped in Waters' favor. As the Commission explained (*id.* at 10a):

²The Commission has held that female ownership qualitatively enhances an integration proposal but is entitled to less weight than minority ownership. See *Radio Gaithersburg, Inc.*, 72 F.C.C. 2d 820, 829 (Rev. Bd. 1979), review denied, FCC 80-734 (Dec. 4, 1980), *aff'd per curiam* without opinion *sub nom. Radio Gaithersburg v. FCC*, 672 F.2d 896 (D.C. Cir. 1981).

West Michigan is entitled to substantial enhancement for local residence and past participation in civic activities in the proposed community of license, but its substantial enhancement is closely followed by Waters' moderate enhancement for Mrs. Waters' residence and past participation in civic activities in the proposed service area. Waters is also entitled to a substantial enhancement for its 100% minority and female ownership integrated with full-time management, while West Michigan's enhancement for 24% female ownership integrated with full-time management is substantially less. Weighing all of the relevant comparative factors, we find that Waters' substantial enhancement for minority and female ownership, together with the moderate enhancement credit awarded for Mrs. Waters' residence and civic activities, mandate the conclusion that the grant of Waters' application will better serve the public interest, convenience, and necessity.

The Commission disagreed with petitioner's argument that the Review Board had "awarded *too much* credit to Waters for minority ownership" (Pet. App. at 6a (emphasis added)). Rejecting the argument that minority ownership is relevant only if there is a substantial minority in the proposed service area, the majority relied instead (*id.* at 8a) on "the continuing underrepresentation of minorities in broadcast ownership" and the fact that "minority controlled stations are likely to serve the important function of providing a different insight to the general public about minority problems and minority views on matters of concern to the entire community and the nation."

Chairman Fowler and Commissioner Sharp dissented, arguing on nonconstitutional grounds that it was necessary "to *weight the degree* of enhancement commensurate with the extent to which minorities are represented in the community of license" (Pet. App. 16a) (Fowler, C., dissenting

(emphasis in original)); see also *id.* at 33a-34a (Sharp, C., dissenting).

3. The court of appeals affirmed. The court first upheld the Commission's decision to award Waters "moderate," as opposed to "slight," enhancement for local residence and civic participation (Pet. App. 47a). The court then held that the preference awarded to Waters based on race was consistent with the Commission's statutory authority (*id.* at 47a-58a) and with equal protection principles, as construed in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), and *University of California Regents v. Bakke*, 438 U.S. 265 (1978) (Pet. App. 58a-64a).

Rehearing en banc was denied with no dissents.

ARGUMENT

The Federal Communications Commission granted the license to operate a new FM radio station in rural Michigan to another fully qualified applicant, rather than petitioner, based on a weighing of numerous factors, including local residence and civic participation, gender, and race. Petitioner asks this Court to review this fact-bound decision and to address the important and sensitive questions of whether and if so in what way the race of an applicant may be considered in awarding a broadcast license. Contrary to petitioner's argument, however, it is by no means clear from the Commission's opinion that race was the dispositive factor in its decision. Moreover, petitioner's right to prevail, even under its own theory, is based upon disputed facts, and the broad constitutional argument advanced by petitioner is difficult, if not impossible, to apply to the facts of this case, which involves a community with a single radio station. For all of these reasons, we believe that this case provides a poor vehicle for addressing the broad legal issues raised by petitioner and that review should accordingly be denied.

While petitioner asserts that this case is “remarkably pristine in its constitutional setting” (Pet. 4), it is in fact impossible to determine from the Commission’s opinion what effect, race had on the decision to award the license to Waters, rather than petitioner. For example, gender, not race, could have been a decisive factor. Waters received greater credit than petitioner because its sole owner was female, whereas only one of petitioner’s three owners was female. This preference alone, without taking race into account, might have been sufficient to outweigh petitioner’s advantage with respect to local ownership and civic participation, where petitioner received “substantial credit” as opposed to Waters’ “moderate credit.”

While arguing that race was given “too much” weight in this case (Pet. App. 6a), petitioner has never contested the weight assigned by the Commission to gender (see *id.* at 38a n.1). Thus, it is by no means clear that Mrs. Waters’ race is essential to a decision in her favor.³

The case is additionally unsuitable for review because petitioner relies on a constitutional argument that may be inapplicable, and is in any event extraordinarily difficult to apply, to the peculiar facts of this case. Petitioner has never argued that the Commission is barred from considering

³The Commission does, however, believe that its policy of granting qualitative enhancement in comparative hearings based on minority participation and ownership is consistent with the governing statute and with the views of a majority of the Court in *University of California Regents v. Bakke*, 438 U.S. 265, 269-324 (1978) (Powell, J.); *id.* at 324-379 (Brennan, White, Marshall and Blackmun, J.J.). The Commission has not reserved any broadcast frequencies for minority owners or established any form of quotas, either overall or within a particular geographic area served by a number of licensees. See Pet. App. 58a-62a; *HLD&M Communications*, 93 F.C.C. 2d 143 (Rev. Bd. 1983) (minority-owned applicant lost in comparative hearing based on totality of factors).

race in comparative hearings (Pet. 7). Instead, petitioner contends (*ibid.*) that race may be considered only if there is a substantial racial minority in the community of license. Since the community of license in this case—the Town of Hart—has few black residents, petitioner argues that Waters was entitled to no preference for minority ownership. There is, however, a substantial black population within the station's proposed service area beyond the Town of Hart (*Waters Broadcasting Corp.*, 88 F.C.C. 2d at 1216; see Pet. App. 6a, 49a), and it is difficult to see why a distinction between the racial composition of the community of license and that of the station's broader service area would be of constitutional significance.

In addition, there are inherent difficulties in applying petitioner's constitutional test in a case such as this involving a one-station town. Petitioner appears to argue (see Pet. 9) that minority owners may be given preference in awarding licenses only if the percentage of minority population in the area exceeds the percentage of minority ownership of stations. Except in the very largest cities, there are not enough stations to permit the implementation of such a finely tuned statistical standard. In the case of a multi-racial community with only one station, application of petitioner's test would be impossible, except in the unlikely event of an applicant with multi-racial ownership corresponding to the community's population mix. Petitioner's submission leaves unanswered the question of how large the minority population of a single-station community would have to be before the race of applicants could be taken into account. Must it approach or exceed the national average? Or must it be substantially higher than that to be considered in awarding the community's only station?

The Commission's discussion of the relevance of minority ownership in this case responded to and was structured by the particular constitutional argument that petitioner raised. Accordingly, while serious constitutional questions are implicated by the consideration of race in the awarding of broadcast licenses, this is not an appropriate case for examining those questions.

CONCLUSION

The petition for a writ of certiorari should be denied.

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